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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1453

GORDON O'BRIEN,
PETITIONER,

v.

FRANK A. HALL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT FRANK A. HALL IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, dated December 29, 1976, was ordered by the Court to be "Not For Publication," but is set out as Appendix A to the Petition, pages 27-33. The opinion of

the United States District Court for the District of Massachusetts, dated April 28, 1976, which was reversed by the Court of Appeals, is set out as Appendix B to the Petition, pages 34-49. It too will not be reported, in accordance with Appendix B of the Rules of the United States Court of Appeals for the First Circuit.

Jurisdiction

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). The judgment of the court below was entered on December 29, 1976, and a Petition for a Rehearing was denied on January 20, 1977. The petition was filed on April 20, 1977. By order of the Clerk of this Court dated May 24, 1977, the time for filing this Brief in Opposition was extended to and including June 22, 1977.

Questions Presented

1. Does a state prisoner's contention that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, without reference to state law, gives him a "liberty" interest which entitles him to due process protections upon his transfer to higher custody status in a non-disciplinary segregation unit, raise a substantial question of law sufficient to justify certiorari in the aftermath of *Meachum* v. *Fano,* 427 U.S. 215 (1976), and in the absence of any opinion in conflict with the negative conclusion of the Court below?

2. Does a state prisoner's contention that flexible procedural guidelines in state prison disciplinary regulations create a right or justifiable expectation rooted in state law sufficient to invoke the Due Process Clause raise any substantial question of law which would justify certiorari in

the aftermath of *Meachum* v. *Fano,* 427 U.S. 215 (1976), where (a.) all disciplinary penalties ordered after hearings resulted in guilty findings were suspended, and (b.) no opinion can be found which is in conflict with the negative conclusion of the Court below?

Constitutional Provision Involved

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case

In 1975 respondent Frank A. Hall, the Massachusetts Commissioner of Correction (hereinafter the "Commissioner"), became concerned about conditions at the Massachusetts Correctional Institution — Bridgewater (hereinafter "MCI Bridgewater"). Information which the Commissioner received made him suspect that petitioner Gordon O'Brien (hereinafter "O'Brien"), a prisoner at MCI Bridgewater, had organized and led a strong-arm group of inmates, which assaulted other inmates and which had intimidated inmates and guards alike. On September 16, 1975, O'Brien was summarily transferred without warning from MCI Bridgewater to the Massachusetts Correctional Institution — Walpole (hereinafter "MCI Walpole") on orders of the Commissioner. At MCI Walpole O'Brien was held in Block 10, a segregation unit, in awaiting action status.

Meanwhile the Commissioner ordered a full investigation of MCI Bridgewater. As a result of the investigation, several assault charges were lodged against O'Brien. Elaborate disciplinary hearings were held on the assault charges

on several days in November and December 1975. O'Brien was represented by counsel throughout these administrative proceedings. He was found guilty on four assault charges and a cumulative sentence of thirty days isolation was ordered. However, upon appeal to the Commissioner the penalty was suspended for 90 days, in view of his long stay in segregated confinement. That period having expired without further incident, O'Brien in effect experienced no disciplinary punishment of any kind for his assaultive behavior at MCI Bridgewater.

In Block 10 at MCI Walpole O'Brien's conditions of confinement were substantially more stringent than those he had enjoyed at MCI Bridgewater. Contrary to his repetitious, boot-strap assertion, however, he was not placed in "solitary". (See, e.g., O'Brien's Petition, pp. 3, 5, 6, 8, 9, 13, 14, 18, 19, 23, 24.) Rather, he was held in awaiting action status in Block 10, segregated from the rest of the prison population. The Commissioner concedes that O'Brien had a materially adverse change in the conditions of his confinement and that he was held in strict security, but that is far different from "solitary". During his stay in Block 10 O'Brien has had a fully furnished cell, the opportunity to have a radio and television, reading materials and writing materials. He has enjoyed limited contact with other inmates, adequate ventilation, regular meals, periodic showers, regular visiting periods, a brief daily recreation period and correspondence privileges. He has had access to educational and counselling programs and to religious services. By way of contrast, were he placed in isolation (the Massachusetts term for "solitary" as O'Brien acknowledges, see Petition, pp. 7, 18), he would be required to spend his time in a minimally furnished cell without radio or television and with limited reading matter. The closed solid door of the isolation cell would preclude contact with others, even in the corridor. He would have no

visits, no access to a shower outside his cell, no recreational time outside his cell and no contact with educational or counselling programs. He could be kept in these isolated conditions, essentially without contact with the rest of the prison or the world outside, for a maximum of 15 days for any one offense. Massachusetts General Laws, c. 127, § 40. This is "solitary", referred to in Massachusetts as isolation. Yet O'Brien has not served any isolation time at all since his transfer; the Commissioner suspended O'Brien's 30 day isolation penalty in view of his long stay in awaiting action status, and since the 90 day suspension period passed without incident, O'Brien effectively faced no disciplinary punishment at all for the assaults he committed on other inmates.

Moreover, O'Brien remained in Block 10 by his own choice after February 20, 1976, when the Commissioner offered to move him to a far less restrictive general population housing area in MCI Walpole. O'Brien declined, apparently out of concern for his own safety. He has since been rehoused in Block 9, a unit less restrictive than Block 10, where contact with other inmates is limited to small groups of pre-screened prisoners.

After disciplinary proceedings were underway, O'Brien wrote a letter to the United States District Court for the District of Massachusetts. The District Court treated the letter as a Federal Civil Rights Act complaint, filed it, and this action commenced. In his complaint (as subsequently amended by counsel), O'Brien challenged his transfer to higher custody status at MCI Walpole as a violation of his due process rights. Relying on the opinion of the First Circuit Court of Appeals in *Fano* v. *Meachum*, 520 F.2d 374 (1975), *rev'd sub nom. Meachum* v. *Fano*, 427 U.S. 215 (1976), the District Court scrutinized the disciplinary hearings afforded to O'Brien to see if they met due process standards required by that case on transfer to

higher custody status. The District Court believed it found two due process defects in the hearings and granted preliminary injunctive relief on that basis. The Commissioner appealed and on his request, the District Court stayed its order. During the pendency of the appeal this Court issued its opinion in *Meachum* v. *Fano,* 427 U.S. 215 (1976), which removed the foundation of O'Brien's case. The First Circuit applied the *Meachum* holding to the facts of the instant controversy, concluded that "[n]either the injunction nor the plaintiff's request for damages can stand after *Meachum* v. *Fano*" (Appendix A to Petition, p. 33), and remanded to the District Court with instructions to dismiss.

In his Petition for a Writ of Certiorari, O'Brien attempts to salvage his case by asserting that alleged due process defects in his disciplinary hearings, held subsequent to his transfer to higher custody status in a segregation unit, may be raised on the strength of his "liberty" interest in avoiding segregated confinement, even though no disciplinary punishment was subsequently imposed after the guilty findings. That claim was laid to rest in unequivocal terms by this Court's holding in the *Meachum* case.

Reasons for Denying the Writ

I. The Petitioner Has Shown No Conflicts in Court Decisions Which Would Justify a Grant of Certiorari.

No "conflict" has been presented by petitioner O'Brien save that between his own position as stated in his Petition (pp. 9-23) and the holdings of this Court in *Meachum* v. *Fano,* 427 U.S. 215 (1976) and *Montanye* v. *Haymes,* 427 U.S. 236 (1976), which were scrupulously applied to the facts of the instant case by the court below (See Appendix A to Petition, pp. 30-33). Petitioner asserts that his own transfer to higher custody status in a segregation unit

implies "[s]ome hard core of fundamental 'liberty interests' [which] are 'rooted' in the Constitution itself" (Petition, p. 13), and thus that due process rights attach. However, this is precisely the proposition that this Court laid to rest in *Meachum,* where it held that the due process clause does not

> ". . . in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the state's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules."

427 U.S. at 225. Unduly severe conditions of confinement may, of course, give rise to a valid claim of constitutional deprivation independent of the Due Process Clause — e.g., the Eighth Amendment. Since the decision in *Meachum,* three Circuits have followed its mandate and rejected due process claims predicated upon transfers where prisoners could demonstrate no "right or justifiable expectation rooted in state law . . . not [to] be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye* v. *Haymes, supra,* 427 U.S. at 242. *See Four Certain Unnamed Inmates v. Hall,* 550 F.2d 1291 (1st Cir. 1977); *Lombardo* v. *Meachum,* 548 F.2d 13 (1st Cir. 1977); *Franklin* v. *Fortner,* 541 F.2d 494 (5th Cir. 1976); *Cooper* v. *Riddle,* 540 F.2d 731 (4th Cir. 1976).

No conflicting decisions can be found. *Powell* v. *Ward,* 542 F.2d 101 (2nd Cir. 1976), cited by Petitioner (Petition,

p. 11, n. 3), is not to the contrary. That case, decided less than three months after the *Meachum* decision, involved the successful appeal by prison administrators of provisions of a pre-*Meachum* District Court injunction regarded by them as too limiting. The Second Circuit simply granted the prison administrators the full measure of relief requested without reference to the principles of due process analysis announced in *Meachum*. In *Mawhinney* v. *Henderson*, 542 F.2d 1 (2nd Cir. 1976), a case decided less than two months after this Court's decision in *Meachum*, the Second Circuit found several claims stated by a prisoner placed in disciplinary solitary confinement, including one alleging violation of due process. The Circuit Court did not mention the *Meachum or Montanye* decisions, and simply stated, as to the due process claims, that remand was required for "a fuller development of the record", 542 F.2d at 4. *Mawhinney* is entirely consistent with *Meachum*, and with the First, Fourth and Fifth Circuit cases noted above, since the prisoner in that case may have had some right rooted in New York state law which triggered due process protections. Alternatively, he may have been able to breathe life into his due process claim at trial on the basis of his other, independent claims of constitutional violation arising from his disciplinary solitary confinement. The three District Court decisions cited by petitioner as raising a conflict are simply irrelevant, since "[t]he Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court." Stern & Gressman, *Supreme Court Practice*, § 4.8, pp. 161-62 (4th ed. 1969). Moreover, none of the decisions presents a genuine conflict. In *Cook* v. *Brockway*, 424 F. Supp. 1046, 1052 (N.D. Texas, 1977), the Court found that "placing of plaintiff in a segregation cell did not deprive him of

any rights to which due process procedures would be applicable." *Sites* v. *McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976), and *Lavine* v. *Wright*, 423 F. Supp. 357 (C.D. Utah, 1976) both involved interpretation of state statutes which provided a source of entitlement as a predicate for due process claims—an element absent in the cases above where no due process right was found.

In short, no decision can be found which conflicts at all with the decision of the First Circuit below. The teaching of *Meachum* and its progeny is clear, and is being consistently applied at the Circuit and District Court levels. There is thus no need for this Court to speak further on these issues, and accordingly, there is no basis here for certiorari.

II. Petitioner Has Presented No Substantial Issue of Law To Justify Review by the Supreme Court.

Petitioner acknowledges that a prisoner may not complain on due process grounds of a "transfer without status change to another prison" absent rights rooted in state law, but argues nonetheless that "rights 'rooted' in the *Constitution* protect him from solitary confinement, (it, of course, takes a 'transfer' to get him there) unless he is afforded the limited Due Process procedures specified by the Court in *Wolff*" (Petition, pp. 16-17). As the First Circuit noted below, "[t]his reading of *Wolff* cannot survive the statement in *Meachum* v. *Fano*, *supra*, that '[t]he liberty interest protected in *Wolff* had its roots in state law.' 44 U.S.L.W. at 5057" (Appendix A to Petition, p. 33, footnote). In any event the issue is insubstantial. This Court has provided all the analytical tools necessary for evaluation of petitioner's due process claim in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), *Meachum*, *Montanye*, and related due

process cases, and need give it no further attention. Moreover, petitioner's claim cannot be evaluated on this record since, as noted above, he never experienced solitary confinement but rather was confined under less severe conditions in a segregation unit. Even though he was found guilty on four disciplinary assault charges, all penalties were suspended and petitioner never served isolation time. Thus he is not in a position to raise the potential claim that Massachusetts statutes create a right not to serve isolation time absent misconduct and thus trigger due process protections. But again, even if this claim could be raised, it is of relatively insignificant dimensions and can easily be evaluated on the basis of the analytical framework already expounded by this Court.

Petitioner's claim that Massachusetts Department of Correction disciplinary regulations create rights rooted in state law and therefore invoke due process protections fares no better. It is again not a significant issue, but one easily resolved on the basis of principles already enunciated by this Court. The First Circuit has already addressed a nearly identical issue in *Four Certain Unnamed Inmates* v. *Hall*, 550 F.2d 1291 (1st Cir. 1977);and *Lombardo* v. *Meachum*, 548 F.2d 13 (1st Cir. 1977); using principles delineated in previous Supreme Court cases. Secondly, any alleged due process violations in the disciplinary hearings below are mooted by the suspension of all penalties imposed upon petitioner. Thirdly, petitioner's claim is wrong on the merits, since the disciplinary regulations merely set forth flexible procedural guidelines and do not in themselves confer any substantive rights rooted in state law. *See Four Certain Unnamed Inmates, supra,* and *Lombardo, supra.* Fourthly, petitioner misconstrued entitlement analysis by taking the content of the regulations as informing due process standards; failure of authorities

to follow specific procedures may give rise to a state law claim, but does not automatically become a federal constitutional issue. Finally, petitioner misreads the regulations themselves and in his discussion (Petition, pp. 26-27), relies upon time limits for "minor" matters, which are not applicable to the "major" disciplinary assault charges lodged against O'Brien.

In sum petitioner raises no meritorious issues and no significant questions; there is accordingly no justification for certiorari.

Conclusion

For the foregoing reasons, the Petition seeking a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit ought to be denied.

Respectfully submitted,

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